events the cheque, on future presentation, will be honoured. It does not, however, imply any representation that the drawer already has money in the bank to the amount shown in the cheque, for he may either have authority to withdraw, or have an honest intention of paying in the necessary money before the cheque can be presented."

(*Ratanlal's* Law of Crimes, 18th edition, page 1058).

Again :—

"Where a person orders goods on credit and promises expressly or impliedly to pay for them on a particular date, then if the prosecution proves that at the date of the contract the circumstances of the accused were such that he must have known that it was practically impossible that he would be able to pay for the goods, the offence of cheating is committed."

(*Ratanlal's* Law of Crimes, 18th edition, page 1057).

On the facts of this case, having regard to the evidence as to the defendant's Bank account the learned President, in my view, was strictly justified in finding that at the time the accused presented the postdated cheques maturing and due on the 15th and 18th respectively the financial position of the accused, as a Government servant dependent on his monthly salary, was such that he must have known that he would not have the funds in the Bank to meet the cheques on the dates they were due for presentation. The facts, therefore, within the letter of the law, strictly support the charges of cheating.

However, with great respect to the learned President, the sentences imposed of six months' imprisonment on each charge to run concurrently were, in my view, wholly excessive and out of all proportion to the nature and seriousness of the offence committed. The accused was a man with a hitherto irreproachable record, who had never been in trouble before. It is abundantly clear that even after these postdated cheques had not been honoured the complainant was ready and willing to allow the accused credit for the next three months until in August he thought fit to make his complaint to the Police.

The case was one which might very much more appropriately have been brought as a civil action in the Magistrate's Court and it is, in my view, highly undesirable that the Police, in the virtual capacity of debt collectors, should undertake the prosecution of cases such as these without prior reference to the Deputy Public Prosecutor for his consideration and approval in each case as to the desirability of instituting criminal proceedings.

The accused was in prison serving this sentence from the 4th October, 1957 to the 6th January, 1958, when this case came to my attention and I made an order for his discharge.

In all the circumstances I am of the opinion that the ends of justice are best served by an order quashing the conviction and sentence and the substitution therefor, under section 183(2) of the Criminal Procedure Code, that the Court finds that the charges are proved but, without proceeding to conviction, orders that the charges be dismissed and the accused unconditionally discharged.

I direct that any conviction recorded against the accused in respect of these charges be expunged from all Police and Prison records. A copy of this Order will be sent to the learned Deputy Public Prosecutor, with a request that he ensures that the necessary action is taken.

Order accordingly.

KASSIM BIN ADAM & ANOR. v. G. E. BANDUKWALA & ANOR.

[O.C.J. (Wee Chong Jin J.) January 8, 1958]

[Singapore — Suit No. 589 of 1957]

Landlord and Tenant — Tenant not in possession of premises — Tenant not staying in the house — Action for possession — No service on tenant — Prayers to eject occupier.

In this action the plaintiff sought against the first defendant to whom they had let on a monthly tenancy No. 10-A Amber Road: (i) a declaration that the defendant having abandoned the use of the premises was no longer their statutory tenant; or alternatively, (ii) an order for recovery of possession of the land and premises in question. By their Statement of Claim the plaintiffs admitted that after the expiry of the notice to quit, alleged to have been duly served on the first defendant, the first defendant became their statutory tenant by virtue of the Control of Rent Ordinance.

They also in the same action sought against the second defendant, Shirin Fozdar, who they claimed now wrongfully occupied the said premises, a declaration that she had no right title estate or interest in the said premises.

The Writ of Summons which described the first defendant as "presently of Bombay at an address unknown" was never served on the first defendant.

The second defendant claimed to be in occupation of the premises as the licensee of the first defendant and denied that the plaintiffs were entitled to the reliefs sought against her.

Held: (1) the first defendant must be served with the Writ of Summons and consequently be properly brought before the Court as it is a fundamental principle of law that no Court can adjudicate on the rights of a person unless he is a party to the proceedings and is properly before the Court. Unless and until the first defendant is properly before the Court, it cannot adjudicate on whether he has forfeited his status as statutory tenant by cesser of possession or occupation. It therefore follows that no presumption can arise against him of cesser of possession or occupation and that he must be deemed to remain in possession and not to have forfeited his status as a statutory tenant;

(2) the Court has no jurisdiction to make an order for recovery of possession against the second defendant who claimed to be in occupation as the licensee of the first defendant unless the first defendant is properly before the Court and an order is made against him as well.

Held further: on the evidence in this case the first defendant's absence has not been sufficiently prolonged to compel the inference of cesser of possession or occupation and the first defendant has both the *animus possidendi* and *corpus possessionis* to establish that he has possession in fact of the premises in that he had the *de facto* intention to return after his absence.

Cases referred to:—

(1) *Brown v. Draper*, (1944) K.B. 309.

(2) *Weinberg v. Lim Siow Peng*, (1955) M.L.J. 152.

(3) *Brown v. Brash*, (1948) 1 All E.R. 922.

(4) *Chartered Bank (Malaya) Trustee Ltd. v. Abu Bakar*, (1957) M.L.J. 40.

(5) *Keeves v. Dean*, (1924) 1 K.B. 685.

(6) *Skinner v. Geary*, (1931) 2 K.B. 546.

CIVIL SUIT.

C. E. N. Arkell for the plaintiffs.

C. L. Duff for the 2nd defendant.

Cur. Adv. Vult.

Wee Chong Jin J.: — In this action the plaintiffs seek against the first defendant, G. E. Bandukwala, to whom they had let on a monthly tenancy No. 10-A Amber Road, Singapore, (hereinafter referred to as "the said premises") the following relief, namely:—

1. A declaration that the first defendant having abandoned the use of the premises situate at No. 10-A, Amber Road, Singapore is no longer the statutory tenant of the plaintiffs in respect thereof; or alternatively,

2. An order for recovery of possession of the land and premises known as and situate at No. 10-A, Amber Road, Singapore.

The plaintiffs in the same action seek against the second defendant, Shirin Fozdar, who they claim now wrongfully occupies the said premises, the following relief, namely:

1. A declaration that the second defendant has no right title estate or interest in the premises situate at and known as No. 10-A, Amber Road, Singapore.

2. An injunction to restrain the second defendant by herself, her servants or agents from remaining on the said premises known as No. 10-A, Amber Road, Singapore.

3. Mesne profits of the said land and premises at the rate of $43 per month against the second defendant as from the 1st February 1957 until judgment is given or possession obtained; costs.

The Writ of Summons which describes the first defendant as "presently of Bombay at an address unknown" was never served on the first defendant and it follows therefore that no order can be made against the first defendant in these proceedings.

The second defendant claims to be in occupation of the said premises as the licensee of the first defendant and denies that the plaintiffs are entitled to the reliefs sought against her.

It is clear that though in form the claim against the second defendant is for a declaration and an injunction, it is insubstance a claim for recovery of possession of the said premises which (it is not disputed) comes within the Control of Rent Ordinance (Cap.242).

The plaintiffs by their Statement of Claim admit that after the expiry of the notice to quit on the 30th September 1956, alleged to have been duly served on the first defendant, the first defendant became the statutory tenant of the plaintiffs by virtue of the Control of Rent Ordinance. On this admission, applying the principle enunciated by the Court of Appeal in England in *Brown v. Draper*,[1] and accepted by the Court of Appeal in *Weinberg v. Lim Siow Peng*,[2] that unless a statutory tenant voluntarily gives up possession to the landlord, he cannot be deprived of the protection of the Rent Acts except by having an order for recovery of possession made against him, it follows that so long as the first defendant remains in possession of the said premises no order for recovery of possession could be made against him unless he is a party to these proceedings. Counsel for the plaintiffs however contends that it was not necessary to make the tenant a party to the proceedings as he had lost his status of a

statutory tenant by cesser of possession or occupation of the premises. In support of this contention counsel cites the case of *Brown v. Brash,*[3] decided by the Court of Appeal in England and the Court of Appeal decision in *Chartered Bank (Malaya) Trustee Ltd. v. Abu Bakar*[4].

In *Brown v. Brash,*[3] the tenant was before the Court and in fact it was an action by him against the then present owners of premises let to him by a previous owner claiming possession of the premises which the present owners had obtained during his absence serving a term of imprisonment. The Court of Appeal in dismissing his appeal held that on the facts he had forfeited his status of statutory tenant and Asquith L.J., enunciated certain general propositions at pages 925-926, *et seq.*

"We are of opinion that a 'non-occupying' tenant *prima facie* forfeits his status as a statutory tenant. But what is meant by 'non-occupying'? The term clearly cannot cover every tenant who for however short a time, or however necessary a purpose, or with whatever intention as regards returning, absents himself from the demised premises. To retain possession or occupation for the purpose of retaining protection the tenant cannot be compelled to spend 24 hours in all weathers under his own roof for 365 days in the year. Clearly, for instance, the tenant of a London house, who spends his week-ends in the country, or his long vacation in Scotland, does not necessarily cease to be in occupation. Nevertheless, absence may be sufficiently prolonged or unintermittent to compel the inference, *prima facie*, of a cesser of possession or occupation. The question is one of fact and of degree. Assume an absence sufficiently prolonged to have this effect. The legal result seems to us to be as follows: — (1) The onus is then on the tenant to repel the presumption that his possession has ceased. (2) To repel it he must, at all events, establish a *de facto* intention on his part to return after his absence. (3) But we are of opinion that neither in principle nor on the authorities can this be enough. To suppose that he can absent himself for 5 or 10 years or more and retain possession and his protected status simply by proving an inward intention to return after so protracted an absence would be to frustrate the spirit and policy of the Acts as affirmed in *Keeves v. Dean*[5] and *Skinner v. Geary*[6]. (4) Notwithstanding an absence so protracted the authorities suggest that its effect may be averted if he couples and clothes his inward intention with some formal, outward, and visible sign of it, i.e., instals in the premises some caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his own ultimate home-coming. There will then, at all events, be someone to profit by the housing accommodation involved which will not stand empty. It may be that the same result can be secured by leaving on the premises, as deliberate symbols of continued occupation, furniture, though we are not clear that this was necessary to the decision in *Brown v. Draper*[1]. Apart from authority, in principle possession in fact (for it is with possession in fact and not with possession in law that we are here concerned) requires not merely an *animus possidendi* but a *corpus possessionis*, viz., some visible state of affairs in which the *animus possidendi finds expression.* (5) If the caretaker (to use that term for short) or the furniture be removed from the premises otherwise than quite temporarily, we are of opinion that the protection, artificially prolonged by their presence, ceases, whether the tenant wills or desires such removal or not."

Before the general propositions enunciated by Asquith L.J., could be applied I am of the opinion that the first defendant must be served with the Writ of Summons and consequently be properly brought before the Court as it is a fundamental principle of law that no Court can adjudicate on the rights of a person unless he is a party to the proceedings and is properly before the Court. Unless and until the first defendant is properly before the Court, it cannot adjudicate on whether he has forfeited his status as statutory tenant by cesser of possession or occupation. It therefore follows that no presumption can arise against him of cesser of possession or occupation and that he must be deemed to remain in possession and not to have forfeited his status as a statutory tenant.

In the *Chartered Bank (Malaya) Trustee Ltd.*[4] *case* the defendant had admitted that the tenant of the premises had absconded to India and it would appear that the Court never considered the question whether the presumption against the tenant of cesser of possession or occupation could arise when the tenant was not a party to the proceedings and the majority decision of the Court turned on the fact whether the defendant was a licensee or agent of the absconded tenant in the case of business premises. In the case before me the premises are plainly domestic premises and there is no admission by the second defendant that the tenant had no intention of returning to the Colony and to continue to occupy the premises in question. I am therefore of the opinion that the *Chartered Bank (Malaya) Trustee Ltd.*[4] *case* does not support the proposition put forward by counsel for the plaintiffs.

Applying the principle enunciated in *Brown v. Draper, supra,* that a statutory tenant is entitled to say that his rights under the Acts have not been affected by an order for recovery of possession against his licensee on the ground that such an order was made without jurisdiction it further follows in my opinion that the Court has no jurisdiction to make an order for recovery of possession against the second defendant who claims to be in occupation as the licensee of the first defendant unless the first defendant is properly before the Court and an order is made against him as well.

In any event, on the evidence led in this case I find as a fact that the first defendant's absence has not been sufficiently prolonged to compel the inference of a cesser of possession or occupation but if it were so I also find as a fact that the first defendant has both the *animus possidendi* and the *corpus possessionis* to establish that he has possession in fact of the said premises in that he had the *de facto* intention to return after his absence and he had clothed that inward intention by leaving his furniture in the said premises and by installing in the premises firstly one Khurshid Gadrawala and after him the second defendant with the status of a licensee and with the function of preserving the said premises for his ultimate return.

For these reasons there must be judgment for the second defendant with costs.

Judgment for 2nd defendant.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*

Re ADAM AMAN; HOESIN BIN GHANI v. PUBLIC PROSECUTOR

[A.Cr.J. (Rigby J.) February 24, 1958]

[Penang — Criminal Appeal No. 49 of 1957 and Criminal Revision No. 32 of 1957]

Criminal Law and Procedure — Witness — Discretion of Court to call — Test to be applied — Witness called after close of prosecution case and after accused had elected not to call evidence — Criminal Procedure Code (Cap.21), s.451.

In this case the appellant had been charged with offences contrary to sections 131(1)(g) and 131(1)(d) of the Customs Ordinance, 1952 in relation to 150,060 Indonesian rupiahs. The appellant was called for his defence and thereupon elected to call no evidence. His counsel then submitted that no case had been made out against the appellant on the ground that there was no evidence that the notes were "legal tender" in Indonesia, within the meaning of section 25 of the Exchange Control Ordinance, 1953. The learned President then adjourned the Court. Subsequently he decided in the interests of justice to call a bank official to give evidence as to the notes. The bank official was called and opportunity was given to the appellant's counsel to cross examine him. After hearing his evidence the learned President convicted the appellant. The main ground of appeal was that the learned President wrongly exercised his discretion at the conclusion of the evidence by calling a witness on a material point which could and should have been foreseen by the prosecution.

Held: it could not be said that the learned President had wrongly exercised his discretion in this case and that the calling of the evidence occasioned a miscarriage of justice and therefore the appeal must be dismissed.

The test to be applied by the Court before exercising its discretion as to whether or not to call additional evidence under section 451 of the Criminal Procedure Code (Cap.21) is "Would it result in an injustice being done to the accused?" In resolving that question technical points ought not to prevail where there is a possibility of their being remedied without doing any injustice.

Cases referred to:—

(1) *Ajami v. Comptroller of Customs,* (1954) 1 W.L.R. 1406.

(2) *Jacob v. Public Prosecutor,* (1948-49) M.L.J. Supp. 20.

(3) *Kee Seng Nee v. R.,* (1949) M.L.J. 210.

(4) *Balfour v. Public Prosecutor,* (1949) M.L.J. Supp. 8.

(5) *R. v. Day,* (1940) 1 All E.R. 402; 27 Cr.App.R. 168.

(6) *R. v. Bakar bin Sahat,* (1951) M.L.J. 202.

(7) *Loke Poh Siang v. Public Prosecutor,* (1957) M.L.J. 107.

(8) *R. v. McKenna,* (1956) Crim.L.R. 327; 40 Cr.App.R. 65.

(9) *R. v. Jackson,* 14 Cr.App.R. 41.

(10) *Cher Tiam Sang v. Public Prosecutor,* Raub — Cr.App.6/53 — unreported.